



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

February 7, 1997

Ms. Sandra C. Joseph
Open Records Counsel/Disclosure Officer
Office of the Comptroller of Public Accounts
LBJ State Office Building
111 East 17th Street
Austin, Texas 78774

OR97-0295

Dear Ms. Joseph:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 103467.

The Comptroller of Public Accounts (the "Comptroller") received an open records request for the following information:

1. All documents, such as interoffice memorandums, letters, legal filings, etc., issued or written regarding Comptroller's Hearing No. 34,263.
2. Additionally, all documents or correspondence/memorandums written by Ms. Shannon Lawler of the Comptroller's Tax Policy Division or any other person in the Comptroller's Audit Division regarding the Comptroller's position regarding the issues addressed by Hearing No. 34,263 (constructive employees, contract labor, etc.).
3. Specifically, any correspondence written to Mr. Clyde Dickey of the Dallas East Audit Office in October of 1996 regarding contract labor/constructive employees.

You have submitted to this office as responsive to the request the items requested in items 2 and 3 listed above as well as a representative sample of the records requested in item 1.¹

¹In reaching our conclusion here, we assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision No. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

You contend that the requested records, or portions thereof, are excepted from required public disclosure pursuant to sections 552.101 and 552.111 of the Government Code.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. Section 111.006(a)(2) of the Tax Code provides:

(a) Except as provided by Subsection (d), the following matter is confidential and may not be used publicly, opened to public inspection, or disclosed except as permitted under Subsection (b)² of this section:

....

(2) all information secured, derived, or obtained by the comptroller or the attorney general during the course of an examination of the taxpayer's books, records, papers, officers, or employees, including an examination of the business affairs, operations, source of income profits, losses, or expenditures of the taxpayer. [Footnote added.]

This provision makes confidential information obtained or derived from taxpayers. See *A & T Consultants v. Sharp*, 904 S.W.2d 668 (Tex. 1995).

In Attorney General Opinion H-223 (1974), this office concluded that although "the actual details of [a taxpayer's] business affairs which have been uncovered by the Comptroller during his investigations" were confidential under the predecessor statute to section 111.006(a)(2) of the Tax Code, the Comptroller may nevertheless release to the public the results of administrative proceedings conducted by the Comptroller's Hearings Division, but only if the Comptroller does not reveal the name of the taxpayer involved or any information as to the nature of the taxpayer's business operations which would serve to identify him.

In his decisions [the Comptroller] must discuss the principles of law applicable to the factual situation in question without going into details which would make identification possible. But as long as he confines himself to generalities, and the identity of the individual taxpayer involved remains unknown, the Comptroller may disclose the decisions he reaches without violating the confidentiality provisions of Title 122A.

²Subsections (b) and (d) are not relevant to the disposition of this open records request.

Attorney General Opinion H-223 (1974) at 4.

You inform us that, in accordance with Attorney General Opinion H-223 (1974) and its progeny, the Comptroller now routinely releases copies of administrative hearing decisions to the public, but with the following information redacted: taxpayer name, taxpayer number, names of any taxpayer representatives, officers, employees, or witnesses; and any details of the taxpayer's business affairs that might permit identification of the taxpayer involved, such as business location or names of companies with whom the taxpayer does business. You now inquire whether the Comptroller may extend the guidelines for public disclosure established in Attorney General Opinion H-223 (1974) to the contents of the Comptroller's hearing file on Hearing No. 34,263 and the other requested documents.

We note that two provisions of the Open Records Act specifically address the public nature of administrative hearing decisions. Section 552.025 of the Government Code provides as follows:

(a) A governmental body with taxing authority that issues a written determination letter, technical advice memorandum, or ruling that concerns a tax matter shall index the letter, memorandum, or ruling by subject matter.

(b) On request, the governmental body shall make the index prepared under Subsection (a) and the document itself available to the public, subject to the provisions of this chapter.³

Further, section 552.022(12) of the Government Code provides that "final opinions, including concurring and dissenting opinions, and orders issued in the adjudication of cases" are public information. The conflict between these two provisions of the Open Records Act and the above cited confidentiality provision found in section 111.006(a)(2) requires the "balancing" of the two related interests. *See, e.g., A&T v. Sharp*, 904 S.W.2d 668, 680 (Tex. 1995). Such a balance is struck by the public disclosure of the administrative hearing decisions with the deletion of information that would tend to identify the taxpayer.

On the other hand, you have not argued that any existing statute requires the disclosure of the hearing files or the other requested documents, and this office is aware of none. Absent such a statute, there is no "balancing" required with regard to the records at issue. The only tax provision governing the release of these records appears to be section 111.006(a)(2) of the Tax Code. We therefore conclude that the Comptroller must not release from the administrative hearing file or the other requested documents any "information

³Section 552.025 also contains subsection (c), which would appear to disallow the applicability of the exceptions to required public disclosure listed in subchapter C of the Open Records Act. In Open Records Letter No. 96-1612 (1996), however, this office observed that the predecessor statute to section 552.025 authorized the withholding of tax rulings and opinions under the Open Records Act's exceptions and concluded that because the legislature intended the codification of the predecessor statute to be non-substantive, this office would construe section 552.025(c) consistently with its predecessor provision.

secured, derived, or obtained by the comptroller" during the course of its examination⁴ of the taxpayer's "books, records, papers, officers, or employees" in compliance with section 111.006(a)(2).

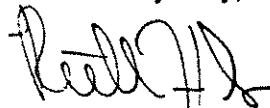
Finally, we address your claims under section 552.111 of the Government Code. Section 552.111 excepts interagency and intra-agency memoranda and letters, but only to the extent that they contain advice, opinion, or recommendation intended for use in the entity's policymaking process. Open Records Decision No. 615 (1993) at 5. The purpose of this section is "to protect from public disclosure advice and opinions *on policy matters* and to encourage frank and open discussion within the agency in connection with its decision-making processes." *Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, writ ref'd n.r.e.) (emphasis added). In Open Records Decision No. 615 at 5, this office held that

to come within the [section 552.111] exception, information must be related to the *policymaking* functions of the governmental body. An agency's policymaking functions do not encompass routine internal administrative and personnel matters . . . [Emphasis in original.]

This office generally agrees that the information you have marked as being protected by section 552.111 may be withheld under that exception. We note, however, that some of the information you have marked is factual in nature and thus is not excepted by section 552.111. See Open Records Decision No. 615 (1993) at 5. We have bracketed the information that you have marked as being protected under section 552.111 but must nevertheless be disclosed. The Comptroller may withhold the remaining information you have marked as being excepted from disclosure pursuant to section 552.111.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Ruth H. Soucy
Assistant Attorney General
Open Records Division

RHS/RWP/ch

Ref.: ID# 103467

⁴See Open Records Letter No. 96-1612 (1996) (discussing scope of term "examination").

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Enclosures: Marked documents

cc: Mr. Gerry L. Ridgely, Jr., C.P.A.
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 (w/o enclosures)